



On appeal, appellant generally asserts that the schedule award decision should be reviewed and that his case should be reviewed regarding denial of wage-loss compensation.

### **FACTUAL HISTORY**

This case has previously been before the Board. In a November 15, 2010 decision, the Board affirmed September 29, 2009 and January 4, 2010 OWCP merit decisions that denied appellant's claim for a schedule award.<sup>2</sup> In a February 14, 2013 decision, the Board found that by a July 26, 2012 decision, OWCP properly denied appellant's request for a hearing, finding that he had no right to request a hearing following the issuance of the Board's November 15, 2010 decision because there was no final decision of OWCP left unreviewed over which OWCP's Branch of Hearings and Review could assume jurisdiction to exercise its discretionary appellate authority.<sup>3</sup> In a second February 14, 2013 decision, the Board affirmed an August 17, 2012 decision on the issue of whether appellant established clear evidence of error regarding the denial of his claim for disability compensation. The Board, however, found that OWCP erroneously issued a denial of appellant's request for reconsideration regarding his entitlement to a schedule award under the clear evidence of error standard where he submitted a September 15, 2010 impairment report from an attending Board-certified orthopedic surgeon, Dr. Henry Leis. The Board remanded the case to OWCP to review and develop the medical evidence and issue an appropriate decision regarding appellant's request for a schedule award.<sup>4</sup> The law and facts of the previous Board decisions are incorporated herein by reference.

On February 25, 2013 appellant requested reconsideration, asserting that he was entitled to wage-loss compensation beginning in 2008 due to his July 8, 2008 employment injury. In a report dated August 10, 2012, Dr. Brian Tsang, Board-certified in anesthesiology and pain management, advised that he had been treating appellant for chronic right upper extremity pain since December 2011. He described findings from a functional capacity evaluation that was performed in August 2012 and indicated that appellant had sustained permanent impairment due to the July 8, 2008 employment injury. Dr. Tsang concluded that appellant could perform sedentary to light physical demand work. In a January 31, 2013 report, he indicated that appellant's right arm pain and weaknesses prevented him from returning to his supply job. In a treatment note dated February 28, 2013, Dr. Tsang provided physical examination findings and diagnosed active sprain of right elbow and forearm, lateral epicondylitis and long term use of high-risk medications.

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<sup>2</sup> Docket No. 10-823 (issued November 15, 2010). On July 8, 2008 appellant, a materials handler, sustained employment-related sprains of the right elbow and forearm and right lateral epicondylitis. He had right arm surgery on February 16, 2009 and returned to modified duty on March 2, 2009. Appellant was removed from federal employment for cause in April 2009. By decision dated September 29, 2009, OWCP denied his claim for disability compensation. It noted that appellant returned to modified duty after the February 13, 2009 surgery and was then terminated for cause and not due to his inability to perform his modified duty assignment. In a separate decision dated September 29, 2009, OWCP denied his claim for a schedule award on the grounds that the medical evidence did not establish a permanent impairment.

<sup>3</sup> Docket No. 12-1699 (issued February 14, 2013).

<sup>4</sup> Docket No. 12-1906 (issued February 14, 2013).

By decision dated March 28, 2013, OWCP denied appellant's reconsideration request on the grounds that his request was untimely filed and that he failed to present clear evidence of error on the part of OWCP.

On April 1, 2013 OWCP referred the medical record, including Dr. Leis' September 15, 2010 report, to OWCP's medical adviser for an opinion regarding permanent impairment. In that report, Dr. Leis evaluated appellant's right upper extremity in accordance with the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (hereinafter A.M.A., *Guides*).<sup>5</sup> He provided physical examination findings, diagnosed lateral epicondylitis and neuropathy (entrapment) of ulnar nerve. Dr. Leis advised that utilizing Table 15-4, Elbow Region Grid, with a history of painful residual symptoms and some decreased range of motion, appellant had a class 1 impairment. He found grade modifiers of one for Functional History (GMFH), two for Physical Examination (GMPE) and one for Clinical Studies (GMCS) which yielded a net adjustment of plus two and concluded that appellant had four percent right upper extremity impairment. Dr. Leis indicated that maximum medical improvement had been reached and that appellant was discharged from his care.

In an April 1, 2013 report, Dr. James W. Dyer, an OWCP medical adviser who is Board-certified in orthopedic surgery, noted his review of the medical evidence, including Dr. Leis' September 15, 2010 report. He advised that maximum medical improvement was reached on September 10, 2010. Dr. Dyer indicated that Dr. Leis had not correctly used the A.M.A., *Guides*, noting that for a diagnosis of chronic recurrent right lateral epicondylitis, post release, under Table 15-4, a class 1 impairment with a default grade C yielded five percent impairment. He applied the net adjustment formula based on the modifiers found by Dr. Leis, which yielded a net adjustment of plus two. Dr. Dyer concluded that appellant had a seven percent impairment of the right upper extremity.

On April 2, 2013 appellant submitted a March 28, 2013 treatment note in which Dr. Tsang described appellant's complaint of right arm pain, provided physical examination findings, and reiterated his diagnoses.

By decision dated April 3, 2013, appellant was granted a schedule award for a seven percent impairment of the right arm, for 21.84 weeks, to run from September 15, 2010 to February 14, 2011.

### **LEGAL PRECEDENT -- ISSUE 1**

OWCP, through regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a) of FECA. OWCP will not review a decision denying or terminating a benefit unless the application for review is filed within one year of the date of that decision.<sup>6</sup> When an application for review is untimely, OWCP undertakes a limited review to determine whether the application presents clear evidence that OWCP's final merit decision was

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<sup>5</sup> American Medical Association, *Guides to the Evaluation of Permanent Impairment* (6<sup>th</sup> ed. 2008).

<sup>6</sup> 20 C.F.R. § 10.607(b); see *Gladys Mercado*, 52 ECAB 255 (2001).

in error.<sup>7</sup> OWCP regulations state that OWCP will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation set forth section 10.607 of OWCP regulations, if the claimant's application for review shows "clear evidence of error" on the part of OWCP.<sup>8</sup> In this regard, OWCP will limit its focus to a review of how the newly submitted evidence bears on the prior evidence of record.<sup>9</sup>

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by OWCP. The evidence must be positive, precise and explicit and must manifest on its face that OWCP committed an error. Evidence that does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to establish clear evidence of error. It is not enough to merely show that the evidence could be construed so as to produce a contrary conclusion. This entails a limited review by OWCP of how the evidence submitted with the reconsideration request bears on the evidence previously of record and whether the new evidence demonstrates clear error on the part of OWCP. To show clear evidence of error, the evidence submitted must be of sufficient probative value to *prima facie* shift the weight of the evidence in favor of the claimant and raise a substantial question as to the correctness of OWCP's decision.<sup>10</sup>

OWCP procedures note that the term "clear evidence of error" is intended to represent a difficult standard. The claimant must present evidence which on its face shows that OWCP made an error (for example, proof that a schedule award was miscalculated). Evidence such as a detailed, well-rationalized medical report which, if submitted before the denial was issued, would have created a conflict in medical opinion requiring further development, is not clear evidence of error.<sup>11</sup> The Board makes an independent determination of whether a claimant has submitted clear evidence of error on the part of OWCP.<sup>12</sup>

### **ANALYSIS -- ISSUE 1**

The merit issue in this case is whether appellant is entitled to disability compensation. By decision dated September 29, 2009, OWCP denied appellant's claim for disability compensation. OWCP noted that appellant returned to modified duty following February 13, 2009 surgery and was then terminated for cause in April 2009 and was not terminated due to his inability to perform his modified duty assignment.<sup>13</sup> Appellant did not submit his current reconsideration request of the September 29, 2009 decision regarding denial of wage-loss compensation until February 25, 2013. The Board finds that as more than one year has elapsed

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<sup>7</sup> *Cresenciano Martinez*, 51 ECAB 322 (2000).

<sup>8</sup> 20 C.F.R. § 10.607.

<sup>9</sup> *See Alberta Dukes*, 56 ECAB 247 (2005).

<sup>10</sup> *Robert G. Burns*, 57 ECAB 657 (2006).

<sup>11</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 1.1602.5(a) (October 2011); *James R. Mirra*, 56 ECAB 738 (2005).

<sup>12</sup> *Nancy Marcano*, 50 ECAB 110 (1998).

<sup>13</sup> Appellant did not file an appeal with the Board of this decision.

between the most recent merit decisions of OWCP regarding this issue of disability compensation, his request for reconsideration was untimely.<sup>14</sup>

The Board also finds that appellant failed to establish clear evidence of error regarding this issue. On reconsideration, appellant requested that OWCP reconsider whether he was entitled to monetary compensation due to the July 8, 2008 employment injury. In a February 14, 2013 decision, the Board found that evidence and argument submitted by March 28, 2013 did not establish clear evidence of error.<sup>15</sup>

A review of the medical evidence regarding disability submitted subsequent to March 28, 2013 indicates that on August 10, 2012 Dr. Tsang, an attending pain management specialist, advised that he had been treating appellant for chronic right upper extremity pain since December 2011 and described findings from a functional capacity evaluation that was performed in August 2012. He concluded that appellant could perform sedentary to light physical demand work. On January 31, 2013 Dr. Tsang indicated that appellant's right arm pain and weaknesses prevented him from returning to his supply job and in a treatment note dated February 28, 2013, Dr. Tsang provided physical examination findings and diagnosed active sprain of right elbow and forearm, lateral epicondylitis and long term use of high-risk medications. He did not discuss the issue of total disability in September 2009 to show that OWCP committed clear evidence of error in its September 29, 2009 decision on the issue of entitlement to disability compensation. The Board further notes that appellant last filed a claim for wage-loss compensation on July 27, 2009 when he claimed wage-loss for the period February 16 to July 27, 2009.

The term "clear evidence of error" is intended to represent a difficult standard and the argument provided here is not the type of positive, precise and explicit evidence which manifested on its face that OWCP committed an error.<sup>16</sup> As the evidence and argument submitted are of insufficient probative value to *prima facie* shift the weight in favor of appellant and raise a substantial question as to the correctness of the September 29, 2009 OWCP decision regarding denial of wage-loss compensation, appellant has not established that OWCP committed error by its March 28, 2013 decision.<sup>17</sup> The Board therefore finds that in accordance with its internal guidelines and with Board precedent, OWCP properly performed a limited review of the argument and evidence submitted by appellant with his reconsideration request to ascertain whether it demonstrated clear evidence of error in the September 29, 2009 decision denying wage-loss compensation and correctly determined that it did not, and thus denied appellant's untimely request for a merit reconsideration on that basis.<sup>18</sup>

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<sup>14</sup> 20 C.F.R. § 10.607(a).

<sup>15</sup> *Supra* note 4.

<sup>16</sup> *Supra* note 10.

<sup>17</sup> *Supra* note 12.

<sup>18</sup> 20 C.F.R. § 10.607(b); *see D.G.*, 59 ECAB 455 (2008).

## LEGAL PRECEDENT -- ISSUE 2

The schedule award provision of FECA<sup>19</sup> and its implementing federal regulations<sup>20</sup> set forth the number of weeks of compensation payable to employees sustaining permanent impairment from loss or loss of use, of scheduled members or functions of the body. However, FECA does not specify the manner in which the percentage of loss shall be determined. For consistent results and to ensure equal justice under the law for all claimants, OWCP has adopted the A.M.A., *Guides* as the uniform standard applicable to all claimants.<sup>21</sup> For decisions issued after May 1, 2009, the sixth edition will be used.<sup>22</sup>

The sixth edition of the A.M.A., *Guides* provides a diagnosis-based method of evaluation utilizing the World Health Organization's International Classification of Functioning, Disability and Health (ICF).<sup>23</sup> Under the sixth edition, for upper extremity impairments the evaluator identifies the impairment class for the diagnosed condition (CDX), which is then adjusted by grade modifiers based on GMFH, GMPE and GMCS.<sup>24</sup> The net adjustment formula is (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX).<sup>25</sup> The sixth edition of the A.M.A., *Guides* also provides that under certain circumstances, range of motion may be selected as an alternative approach in rating impairment. An impairment rating that is calculated using range of motion may not be combined with a diagnosis-based impairment and stands alone as a rating.<sup>26</sup>

OWCP procedures provide that, after obtaining all necessary medical evidence, the file should be routed to OWCP's medical adviser for an opinion concerning the nature and percentage of impairment in accordance with the A.M.A., *Guides*, with the medical adviser providing rationale for the percentage of impairment specified.<sup>27</sup>

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<sup>19</sup> 5 U.S.C. § 8107.

<sup>20</sup> 20 C.F.R. § 10.404.

<sup>21</sup> *Supra* note 14.

<sup>22</sup> FECA Bulletin No. 09-03 (issued March 15, 2009).

<sup>23</sup> A.M.A., *Guides*, *supra* note 6 at 3, section 1.3, "The International Classification of Functioning, Disability and Health (ICF): A Contemporary Model of Disablement."

<sup>24</sup> *Id.* at 385-419.

<sup>25</sup> *Id.* at 411.

<sup>26</sup> *Id.* at 390. The A.M.A., *Guides* explains that diagnoses in the grid that may be rated using range of motion are followed by an asterisk.

<sup>27</sup> See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6(d) (August 2002).

## ANALYSIS -- ISSUE 2

OWCP accepted that appellant sustained right elbow and forearm sprains and right lateral epicondylitis. On April 2, 2013 appellant was granted a schedule award for seven percent impairment of the right upper extremity.

In a September 15, 2010 report, Dr. Leis, an attending orthopedic surgeon, indicated that maximum medical improvement had been reached. He advised that, for a diagnosis of lateral epicondylitis and neuropathy (entrapment) of ulnar nerve, under Table 15-4, Elbow Region Grid, with a history of painful residual symptoms and some decreased range of motion, appellant had a class 1 impairment. Dr. Leis found grade modifiers of one for functional history, two for physical examination and one for clinical studies which yielded a net adjustment of plus two and concluded that appellant had four percent right upper extremity impairment.

In an April 1, 2013 report, Dr. Dyer, an OWCP medical adviser reviewed Dr. Leis' September 15, 2010 report. He indicated that maximum medical improvement was reached on September 10, 2010. Dr. Dyer advised that Dr. Leis had not correctly applied the A.M.A., *Guides*, noting that for a diagnosis of chronic recurrent right lateral epicondylitis, post release, under Table 15-4, a class 1 impairment with a default grade C yielded five percent impairment. He applied the net adjustment formula based on the modifiers found by Dr. Leis, which yielded a net adjustment of plus two. Dr. Dyer concluded that, under Table 15-4, seven percent was a more appropriate impairment rating for the right arm.

The Board has carefully reviewed these reports and finds that, taken together, they constitute the weight of the medical evidence. Dr. Dyer, relied on the physical findings provided by Dr. Leis, the attending physician, and properly applied Table 15-4 of the A.M.A., *Guides*.<sup>28</sup> There is no additional impairment evaluation in the record. Appellant therefore has seven percent impairment of the right upper extremity.

Appellant may request a schedule award or increased schedule award based on evidence of a new exposure or medical evidence showing progression of an employment-related condition resulting in permanent impairment or increased impairment.

## CONCLUSION

The Board finds that, as appellant's request for reconsideration was untimely filed and he failed to establish clear evidence of error, OWCP, therefore, properly denied a merit review of his claim on that issue and further finds that he has a seven percent impairment of the right upper extremity.

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<sup>28</sup> *Supra* notes 26 and 27.

**ORDER**

**IT IS HEREBY ORDERED THAT** the April 3 and March 28, 2013 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: March 14, 2014  
Washington, DC

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge  
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge  
Employees' Compensation Appeals Board